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No. 90-248

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE PROPER STANDARD OF APPELLATE REVIEW IN THIS EMPLOYMENT DISCRIMINATION LAWSUIT IS AN ISSUE THAT CAN AND SHOULD BE CONSIDERED BY THIS COURT BECAUSE THE DECISION IN *METRO BROADCASTING, INC. v. FEDERAL COMMUNICATIONS COMM'N*, —— U.S. ——, 110 S.CT. 2997, CONSTITUTED AN INTERVENING, SUBSTANTIAL CHANGE IN THE CONTROLLING LAW ON THIS POINT AFTER THE DECISION OF THE COURT OF APPEALS	2
III. THE ISSUE OF WHETHER THE NINTH CIRCUIT IMPROPERLY USED THE CITY AND COUNTY OF SAN FRANCISCO AS THE RELEVANT LABOR MARKET TO DETERMINE WHETHER PLAINTIFFS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION IN THE SAN FRANCISCO FIRE DEPARTMENT IS ALSO PROPERLY BEFORE THIS COURT FOR DECISION	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. Bd. of School Directors, Etc., 616 F.2d 305 (7th Cir. 1980)	3
Ass'n. Against Discrimination v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. den.*, 455 U.S. 988 (1982)	2
Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983)	2
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	4
City and County of San Francisco v. Fair Employment and Housing Comm'n, 191 Cal.App.3d 97 (1987)	5
Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989)	2, 5, 8
Kirkland v. N.Y. State Dept. of Correctional Services, 520 F.2d 420 (2d Cir. 1975)	2
Metro Broadcasting, Inc. v. Federal Communications Comm'n, —— U.S. ——, 110 S. Ct. 2997	2, 3, 4
Moore v. Nat'l Assn. of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985)	2
South v. Rowe, 759 F.2d 610 (7th Cir. 1985)	3
Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984)	4
Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982), *cert. granted, Firefighters Local No. 1784 v. Stotts*, 642 U.S. 1105, *rev'd*, 467 U.S. 1105	3
United States v. City of Alexandria, 614 F.2d (5th Cir. 1980)	2
United States v. City and County of San Francisco, 696 F.Supp. 1287 (N.D. Cal. 1987)	7
Vanguards of Cleveland v. City of Cleveland and Local 93 I.A.F.F., AFL-CIO, 753 F.2d 479 (6th Cir. 1985), *cert. granted, Local 93, Int'l Ass'n Of Firefighters v. City of Cleveland*, 474 U.S. 816, *aff'd*, 478 U.S. 501 (1986)	3
Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984)	2

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Petitioner San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO, submits this Reply Brief to address arguments first raised in the briefs in opposition to its petition for a writ of certiorari, to wit: whether Petitioner Local 798 is barred by a failure to raise the issues below from requesting review by this Court of, first, the appropriate standard of appellate review on appeal by adversely affected nonminority employees of a District Court order approving a consent decree in an employment discrimination lawsuit and, second, whether the population of the

City and County of San Francisco is the relevant labor market for purposes of establishing a *prima facie* case of employment discrimination in the San Francisco Fire Department. For the following reasons, this Court should conclude that both of those issues properly may and should be brought before it for decision.

II. THE PROPER STANDARD OF APPELLATE REVIEW IN THIS EMPLOYMENT DISCRIMINATION LAWSUIT IS AN ISSUE THAT CAN AND SHOULD BE CONSIDERED BY THIS COURT BECAUSE THE DECISION IN *METRO BROADCASTING, INC. v. FEDERAL COMMUNICATIONS COMM'N*, —— U.S. ——, 110 S.CT. 2997, CONSTITUTED AN INTERVENING, SUBSTANTIAL CHANGE IN THE CONTROLLING LAW ON THIS POINT AFTER THE DECISION OF THE COURT OF APPEALS

At the time of the proceedings before the Ninth Circuit Court of Appeals in this employment discrimination lawsuit, the Ninth Circuit and every other Court of Appeals to consider the point had consistently applied the very liberal "abuse of discretion" standard of appellate review where, as here, a District Court had upheld a municipal employment program which embraced hiring and promotional preferences based on race but which was embodied in a consent decree rather than in a statute or ordinance. *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), Appendices to Petition for Writ of Certiorari, pp. 1a-27a; *Kirkland v. N.Y. State Dept. of Correctional Services*, 520 F.2d 420, 429-430 (2d Cir. 1975); *Ass'n. Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 278-279 (2d Cir. 1981), *cert. den.*, 455 U.S. 988 (1982); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983); *Moore v. Nat'l Assn. of Securities Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985); *Williams v. City of New Orleans*, 729 F.2d 1554, 1558-1559 (5th Cir. 1984) (discussing case of *United States v. City of Alexandria*,

614 F.2d 1358 (5th Cir. 1980) as an "exceptional circumstance" to the Fifth Circuit's "expressed preference" for the abuse of discretion standard of review); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 (6th Cir. 1982), *cert. granted, Firefighters Local No. 1784 v. Stotts*, 462 U.S. 1105, rev'd 467 U.S. 1105; *Vanguards of Cleveland v. City of Cleveland and Local 93 I.A.F.F., AFL-CIO*, 753 F.2d 479, 484 (6th Cir. 1985), *cert. granted, Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 474 U.S. 816, aff'd 478 U.S. 501 (1986); *Armstrong v. Bd. of School Directors, Etc.*, 616 F.2d 305, 313-314 (7th Cir. 1980); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985).

The Ninth Circuit rendered its decision in this appeal on December 4, 1989, and its decision denying rehearing on May 9, 1990. One and one-half months later, on June 27, 1990, this Court held in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, —— U.S. ——, 110 S.Ct. 2997, that a different standard of judicial review is applicable to "benign" race-conscious employment programs adopted by the Congress than to racial employment preferences adopted by state and local governments. The Court explained that whereas deference is to be given to racial classifications employed by Congress because it is a co-equal branch of government, "strict scrutiny" is to be applied to race- and gender-conscious employment programs adopted by state and local governments because there is "a heightened danger of oppression from political factions in small, rather than large, political units" and a more significant likelihood that municipal governments will be used as instruments of discrimination. *Id.*, 110 S.Ct. at pp. 3008-3009.

Until this distinction was made clear in *Metro Broadcasting*, it was not readily apparent that the uniform application by the Courts of Appeals of the "abuse of discretion" standard of appellate review to consent decrees which embrace hiring and promotional preferences in

municipal employment based on race was in error. For this reason and because *Metro Broadcasting* was decided after the decision of the Ninth Circuit in this appeal, it necessarily follows that *Metro Broadcasting* constituted an intervening, substantial change in the controlling law on this point.

An intervening, substantial change in the controlling law is an "exceptional circumstance" which permits this Court to consider an argument not previously raised in the lower courts. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896 n.7 (1984); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-321, and n.6 (1971). Accordingly, even though Petitioner Local 798 did not raise the issue in the proceedings before the Ninth Circuit of the proper standard of appellate review of consent decrees which embrace racial preferences in municipal employment, that issue may properly be reviewed by this Court.

Respondents also contend that the Court should decline to review this issue because the standard of review actually applied by the Ninth Circuit was "strict scrutiny" rather than "abuse of discretion." However, although the decision of the Ninth Circuit appears to purport in some instances to apply "strict scrutiny," the Ninth Circuit failed to recite a comprehensive analysis and explanation of the manner in which the affirmative, race-conscious relief of the consent decree was narrowly tailored to remedy only those claims of discrimination which were supported by the evidence but instead summarily concluded that the evidence before the District Court was sufficient to justify such relief.[1] Similarly, the Ninth Circuit made no meaningful analysis of the issue of whether minority firefighters were being granted pro-

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[1] The Ninth Circuit failed to analyze or explain, for example, the connection, if any, between the provision of the consent decree for the promotions of 13 Hispanic employees and 10 Asian employees to the rank of Lieutenant and the District Court's finding of past discrimination against Black candidates for promotion to that rank.

motions under the decree without any legitimate verification that they were actually qualified for those promotions.[2] It is thus clear that the Ninth Circuit did not make its own, independent application of the law to the facts. Instead, the Ninth Circuit merely examined the decision of the District Court to determine whether the District Court had applied the correct principles of law (i.e., "strict scrutiny") to the facts. The standard of appellate review actually applied by the Ninth Circuit was thus much less exacting than the "strict scrutiny" standard of review, and amounted in effect to the "abuse of discretion" standard of review. This is confirmed by the concluding paragraph of the Ninth Circuit decision, which states in pertinent part:

> The district court did not abuse its discretion in concluding that the consent decree is fundamentally fair, adequate and reasonable and comports with the equal protection provisions of the fourteenth amendment and the requirements of Title VII.

890 F.2d at p. 1452; Appendix A To Petition For Writ Of Certiorari, p. 27a.

For these reasons and for the reason that a compelling need exists for consistency in the standard of appellate

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[2] The District Court justified the provisions of the consent decree for the promotion of 39 minority candidates who had taken the 1984 promotional examination for the rank of Lieutenant on the ground that each candidate's work history and performance evaluations would be examined to ensure that the candidate was qualified for promotion. 696 F.Supp. at p. 1306; Appendix B to Petition For Writ Of Certiorari, pp. 67a-68a. The plaintiffs themselves had successfully contended, however, that no promotional selection procedure can adequately assess the qualifications of a candidate for promotion to the rank of Lieutenant unless that selection procedure tests supervisory skills and abilities. *See City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal.App.3d 97 (1987). Examination of each candidate's work history and performance evaluations would not constitute a test of the candidate's supervisory skills and abilities, and thus could not ensure that the candidate was qualified for promotion.

review that is to be applied to municipal employment programs which provide preferential treatment for females and minorities, this Court should grant the petition for a writ of certiorari and direct the Courts of Appeals that they are not merely to observe whether the District Courts apply "strict scrutiny" to such programs but are instead to independently apply "strict scrutiny" themselves to all such programs, regardless of whether those programs are the products of ordinances or consent decrees.

III. THE ISSUE OF WHETHER THE NINTH CIRCUIT IMPROPERLY USED THE CITY AND COUNTY OF SAN FRANCISCO AS THE RELEVANT LABOR MARKET TO DETERMINE WHETHER PLAINTIFFS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION IN THE SAN FRANCISCO FIRE DEPARTMENT IS ALSO PROPERLY BEFORE THIS COURT FOR DECISION

With regard to respondents' contention that Petitioner Local 798 also failed to raise the issue below of whether it was error to use the City and County of San Francisco as the relevant labor market to determine whether plaintiffs established a *prima facie* case of employment discrimination in the San Francisco Fire Department through statistical imbalances, respondents have neglected to inform the Court that this issue was the primary subject of the Petition For Rehearing And Suggestion For Rehearing En Banc which Petitioner Local 798 filed with the Ninth Circuit on December 26, 1989. A copy of that Petition For Rehearing is attached as an appendix to this Reply Brief. Petitioner Local 798's argument on this issue is set forth at pp. 2-6 (pp. 6a-9a of the appendix).

Petitioner Local 798 contended in the objections to the consent decree which it filed in the District Court that it would be improper to find a *prima facie* case of employment discrimination on the basis of a comparison of

the racial and ethnic composition of the population of the City and County of San Francisco to the racial and ethnic composition of the workforce of the San Francisco Fire Department. (Appendix F to Petition For Writ Of Certiorari, pp. 191a-194a). The District Court apparently recognized that this objection was well taken. As noted at p. 15 of the Brief Of The City And County Of San Francisco In Opposition To The Petition For Writ Of Certiorari, when the District Court came to the conclusion that the facts before it were sufficient to establish a *prima facie* case of employment discrimination sufficient to justify the affirmative, race-conscious relief imposed by the consent decree, it did not rely upon a comparison of the population of the City and County of San Francisco to the workforce of the San Francisco Fire Department. Instead, the District Court came to this conclusion on the basis of the adverse impact of the Department's hiring practices on the actual pool of qualified applicants.[3] *United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1307-1308 (N.D. Cal. 1987); Appendix B to Petition For Writ Of Certiorari, p. 70a. Because the District Court did not decide the issue of whether the City and County of San Francisco is the relevant labor market for the purpose of establishing a *prima facie* case of employment discrimination in the San Francisco Fire Department through statistical imbalances,[4] that issue was not included in the issues

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[3] Petitioner Local 798 contends that this was error because the adverse effects of these hiring practices on minority candidates had already been remedied by the District Court's order of February 26, 1987. Petition For Writ Of Certiorari at pp. 23-25.

[4] Although the District Court discussed the union's contention that the relevant labor market was the population of the Standard Consolidated Statistical Area, which includes the nine counties surrounding San Francisco as well as the City, that discussion dealt with the issue of whether the affirmative, race-conscious relief was narrowly tailored to the specific employment practices that have been found unlawful rather than with the issue of whether the evidence before the District Court would establish a *prima facie*

presented to the Ninth Circuit for decision on Petitioner Local 798's appeal of the consent decree. Inexplicably, however, the Ninth Circuit interpreted the District Court's decision to hold that

> the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a *prima facie* case of past discrimination . . . .

890 F.2d at pp. 1446-1447; Appendix A To Petition For Writ of Certiorari, p. 14a.

Thus, the Ninth Circuit did not uphold the consent decree on the basis of the statistical evidence relied upon by the District Court, namely, the adverse impact of the Department's hiring practices on the actual pool of qualified applicants, but instead upheld the consent decree on the basis of different statistical evidence, namely, a comparison between the proportion of women and minorities in the population of the City and the proportion of women and minorities in the Fire Department workforce. Since Petitioner Local 798 could not reasonably have anticipated that the Ninth Circuit would base its decision on different statistical evidence than that relied upon by the District Court, the union should not be held to have failed to preserve its right to present argument on this issue to the Ninth Circuit, or to present that issue to this Court for decision, merely because the union did not address that issue in the Ninth Circuit until its Petition For Rehearing.

For all of these reasons and for the reason that the decision of the Ninth Circuit is squarely in conflict with the decisions of other Courts of Appeals on the same is-

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case of unlawful employment discrimination sufficient to justify the imposition of any relief at all. 696 F.Supp. at pp. 1308-1309; Appendix B To Petition For Writ Of Certiorari, pp. 71a-73a.

sue, this Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's decision that a *prima facie* case of employment discrimination can be established merely by a comparison between a municipal employer's workforce and the city's population.

CONCLUSION

For all of the reasons stated above, there is no merit to respondents' contentions that the issues presented in this petition for a writ of certiorari are not properly before the Court for review.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-1905
88-2735
88-2884
88-15473
88-15474
(Consolidated)

U.S.D.C. Nos. C84-1100 MHP & C84-7089 MHP

FONTAINE DAVIS, *et al.*,
Plaintiffs-Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant-Intervenor-Appellant.

UNITED STATES OF AMERICA,
Plaintiff,

and

FONTAINE DAVIS, *et al.*,
Plaintiffs in Intervention/Appellees,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
Defendant in Intervention/Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND STATEMENT OF COUNSEL .....

II. THE COURT ERRONEOUSLY CONCLUDES THAT A PRIMA FACIE CASE OF UNLAWFUL EMPLOYMENT DISCRIMINATION SUFFICIENT TO SUPPORT COURT-ORDERED RACE-BASED HIRING AND PROMOTIONS CAN BE ESTABLISHED BY A COMPARISON BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY .....

III. THE DISTRICT COURT COMMITTED CLEAR ERROR BY APPROVING A CONSENT DECREE THAT WAS NOT NARROWLY TAILORED TO REMEDY PAST DISCRIMINATION BUT WAS INSTEAD DESIGNED TO ESTABLISH AND MAINTAIN A BALANCE BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY .....

IV. SUGGESTION FOR REHEARING EN BANC..

TABLE OF AUTHORTIES

Cases Page

Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) .....

City and County of San Francisco v. Fair Employment & Housing Com., 191 Cal.App.3d 976 (1987) .....

Cooperrider v. Civil Service Commission, 97 Cal. App.3d 495 (1979) .....

EEOC v. Chicago Miniature Lamp Works (N.D. Ill. 1985) 622 F.Supp. 1281 .....

Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987) *den. rehear en banc, cert. denied* —— U.S. ——, 108 S.Ct. 2023 (1988) .....

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) .....

Local 28 of Sheet Metal Workers v. E.E.O.C., 478 U.S. 421 (1986) .....

United States v. City and County of San Francisco, 656 F.Supp. 276 (N.D.Cal. 1987) .....

United States v. City and County of San Francisco, 696 F. Supp. 1287 (N.D. Cal. 1988) .....

United States v. Paradise, 480 U.S. 149 (1987) .....

Wards Cove Packing Co. v. Atonio, —— U.S. ——, 109 S.Ct. 2115, 2121-2122 (1989) .....

Western Addition Community Org. (WACO) v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971), and 369 F. Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 515 F.2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975) .....

Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1983, *en banc*) .....

Constitution, Statutes and Regulations

California Constitution, Art. XI, § 10(b) .....

Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.* .....

I. INTRODUCTION AND STATEMENT OF COUNSEL.

Defendant-Intervenor-Appellant SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, respectfully requests that a rehearing be granted in this appeal.

This request for a rehearing is made on the grounds that, first, the decision which the Court rendered in this appeal on December 4, 1989, overlooked material points of fact and law and, additionally, this decision is in clear conflict with another decision of the Court, *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), which was not addressed in the opinion.

It is counsel's judgment that these grounds exist with regard to each of the following points of law and facts:

(A) In order to establish a prima facie case of unlawful employment discrimination sufficient to support court-ordered race-based hiring and promotions in the San Francisco Fire Department, the determination that females and minorities are underrepresented in the city and county's work force may not be based on an artificially defined population pool such as the residents of the city and county but instead must be based on the general population in the entire metropolitan bay area; and

(B) Because the district court had already granted relief eliminating the effects of past discrimination and prohibiting future discrimination in hiring and promotions in the San Francisco Fire Department, the affirmative race-conscious remedies approved by the Court were not necessary to remedy unlawful past discrimination but instead were designed and intended solely for the impermissible purpose of achieving and maintaining a balance between the percentage of females and minorities in all ranks of the fire department and the percentage

of females and minorities among residents of the city and county.

II. THE COURT ERRONEOUSLY CONCLUDES THAT A PRIMA FACIE CASE OF UNLAWFUL EMPLOYMENT DISCRIMINATION SUFFICIENT TO SUPPORT COURT-ORDERED RACE-BASED HIRING AND PROMOTIONS CAN BE ESTABLISHED BY A COMPARISON BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY.

The first material point of law overlooked by the Court involves the issue of whether the race-based hiring and promotional provisions of the consent decree upheld on this appeal were supported by evidence sufficient to establish a *prima facie* case that the City and County of San Francisco has committed unlawful discrimination.

In order to establish a *prima facie* case of unlawful employment discrimination through the use of statistics showing that minorities are underrepresented in the employer's work force, the comparison that is the basis for those statistics may not be to an artificially defined population pool but rather must be to the "qualified" population in the relevant labor market. *See Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S.Ct. 2115, 2121-2122 (1989):

> It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force

in no way reflected "the pool of qualified job applicants" or the "*qualified* population in the labor force."

See also Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (District court must make findings that the labor market being used as the basis for statistical comparisons does not improperly include or exclude geographical areas with substantial numbers of qualified minorities); *Associated General Contractors of California, Inc. v. City and County of San Francisco, supra*, 813 F.2d 922, 934 (Affirmative action plan not justified by finding of San Francisco Board of Supervisors of past unlawful discrimination against minority enterprises in awards of municipal contracts because that finding was based solely on awards of contracts to firms within San Francisco rather than awards of contracts to the actual pool of available contractors, which included many firms outside the city's borders).

For positions such as police officer and firefighter, involving skills that the general population may possess, the relevant labor market is the general population in the actual geographic area from which the employer can reasonably be expected to recruit new employees and in which its current employees are likely to reside. *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1983, *en banc*) (District court properly disapproved consent decree in which quota hiring was based on a comparison of the number of black police officers employed by City of New Orleans to the percentage of black persons in the population of Orleans Parish rather than to the percentage of black persons in the Standard Metropolitan Statistical Area); *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) *den. rehear en banc, cert. denied* —— U.S. ——, 108 S.Ct. 2023 (1988) (District of Columbia Fire Department affirmative action plan held invalid because no imbalance existed between the percentage of blacks currently employed as firefighters and the

percentage of blacks in the entire District of Columbia metropolitan area).

> "[T]he percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital.

Id., at 77.

Art. XI, § 10(b) of the California Constitution specifically forbids the City and County of San Francisco from restricting its labor force to city and county residents, and thus requires the city and county to hire and employ persons from the entire metropolitan bay area. *Cooperrider v. Civil Service Commission*, 97 Cal.App.3d 495 (1979).

It necessarily follows that with regard to employment in the San Francisco Fire Department, the relevant labor market is the Standard Metropolitan Statistical Area, which comprises the entire metropolitan San Francisco Bay area. *See EEOC v. Chicago Miniature Lamp Works* (N.D. Ill. 1985) 622 F.Supp. 1281, 1288-89:

> "Standard Metropolitan Statistical Area" ("SMSA") is a geographic area comprising a city having a population of 50,000 or more, the county in which the city is located and the outlying counties that have a high degree of economic and social integration with the nucleus.

As noted in the decision which the Court rendered in this appeal on December 4, 1989, the finding of the district court that the evidence in the record of this action was sufficient to establish a *prima facie* case of unlawful discrimination was not based upon a comparison of the representation of minorities in the work force of the

San Francisco Fire Department to the representation of minorities in the general population of the metropolitan bay area. Instead, that finding was based upon a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the City and County:

> The district court found that the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a *prima facie* case of past discrimination and justify the affirmative action provisions in the decree.

Slip Opinion, p. 14037.

The decision of this Court specifically affirmed this erroneous finding. Slip Opinion, p. 14038.

Because the decision of this Court has thus clearly overlooked the material point of law that a *prima facie* case of unlawful discrimination cannot properly be established on the basis of a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the city and county but instead must be based upon a comparison of the representation of females and minorities in the work force of the San Francisco Fire Department to the representation of females and minorities among residents of the entire metropolitan bay area, and because the decision of the Court on this point is in clear conflict with its decision in *Associated General Contractors of California, Inc. v. City and County of San Francisco, supra*, 813 F.2d 922, a rehearing should be granted and the decision of the district court on this point should be reversed.

III. THE DISTRICT COURT COMMITTED CLEAR ERROR BY APPROVING A CONSENT DECREE THAT WAS NOT NARROWLY TAILORED TO REMEDY PAST DISCRIMINATION BUT WAS INSTEAD DESIGNED TO ESTABLISH AND MAINTAIN A BALANCE BETWEEN THE REPRESENTATION OF FEMALES AND MINORITIES IN THE WORK FORCE OF THE SAN FRANCISCO FIRE DEPARTMENT AND THE REPRESENTATION OF FEMALES AND MINORITIES AMONG RESIDENTS OF THE CITY AND COUNTY.

A rehearing should also be granted because the Court has overlooked material points of fact and law which clearly demonstrate that the consent decree should be overturned because it was not narrowly tailored to remedy past unlawful discrimination but instead was designed to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

Affirmative race-conscious relief may only be imposed by the courts when there is no other effective way to ensure the full enjoyment of rights protected by Title VII of the Civil Rights Act of 1964. *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 448-453 (1986). Such relief may never be adopted solely for the purpose of correcting a racially imbalanced work force, is only appropriate when other, race-neutral remedies have proven ineffective, and must be narrowly tailored to the specific employment practices that have been found unlawful. *Id.* at 448-449; *United States v. Paradise*, 480 U.S. 149, 166-177 (1987).

No one denies that unlawful discrimination has occurred in hiring and promotions in the San Francisco Fire Department.

However, as this Court noted in its decision of December 4, 1989, prior relief for the City's unlawful past discrimination had been granted by the district court in *Western Addition Community Org. (WACO) v. Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971), and 369 F. Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 515 F.2d 542 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975). Slip Opinion at p. 14036.

In addition to the relief granted in *WACO*, further relief had been granted by the district court in the course of this action in order to remedy unlawful discrimination committed by the City after the expiration of the *WACO* consent decree in 1982. That relief, however, was not taken into account in this Court's discussion of whether the affirmative race-conscious provisions of the consent decree that was approved by the district court in this action on June 10, 1988, were necessary to remedy unlawful past discrimination or were instead designed solely to correct a racially imbalanced work force.

When that further relief is taken into account, it becomes clear that the affirmative race-conscious provisions of the consent decree were not necessary to remedy unlawful past discrimination that remained uncorrected but instead were designed solely to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

In this regard, the district court issued an order in this action on February 26, 1987, granting a motion of the United States for partial summary judgment after the City had abandoned an entry-level examination that it had administered in 1982-1983 and promotional examinations that it had administered in 1984 for the ranks of lieutenant and fire inspector. *United States v. City and County of San Francisco*, 656 F.Supp. 276 (N.D. Cal. 1987).

This order of February 26, 1987, required the City to develop new entry-level and promotional selection procedures that were valid and nondiscriminatory and permanently enjoined the city and county from committing any further violations of Title VII of the Civil Rights Act of 1964. *Id.* at 289-291.

In this same order, the district court required the City to hire its first female firefighters. *Id.*, at 292.

The district court also directed the City to maintain an extensive program of recruitment and training directed at increasing the number of qualified Black, Hispanic, Asian and female applicants for firefighter positions. *Id.*, at 290.

The district court specifically recognized in its order of February 26, 1987, that the City's abandonment of the 1982-83 entry-level examination and the 1984 promotional examinations eliminated any claim by the females and minorities who took those examinations that they had been denied individual employment opportunities in violation of Title VII.

> On a record limited only to the bare fact that the City administered and then cancelled, prior to hiring, certain invalid examinations, the court, as a matter of law cannot find a discriminatory denial of individual employment opportunities violative of Title VII.

Id., at 285, n.7.

The district court also stated that the record before it at that time did not justify "affirmative relief" or any other remedy beyond the permanent injunctive relief and interim hiring provisions set forth in its order. *Id.*, at 289.

With the sole exception of a decision by the California Court of Appeal that a job-related promotional examination administered by the City in 1978 had nevertheless

unlawfully discriminated against black candidates because that examination had failed to test for supervisory skills and abilities (*City and County of San Francisco v. Fair Employment & Housing Com.*, 191 Cal.App.3d 976 (1987)), no new evidence of unlawful discrimination was presented to the district court between the entry of the order of February 26, 1987, and the submission of the consent decree to the district court for approval on November 12, 1987.

No entry-level or promotional examinations were given by the city and county during this period, hence there was no evidence that the city and county had resisted or purposely failed to comply with the requirement of the February 26, 1987 order that it administer entry-level and promotional examinations that are valid and nondiscriminatory.

Accordingly, since the district court had specifically recognized in its order of February 26, 1987, that there was no evidence in the record at that time to support the imposition of "affirmative relief," the only evidence in the record at the "fairness hearing" on December 22, 1987 to support race-conscious relief was the occurrence of discrimination against Black candidates in the 1978 examination for lieutenant.

While this evidence might justify a consent decree providing affirmative relief to Black persons who took that particular examination, the requirement that affirmative race-conscious remedies be narrowly tailored to the specific employment practice that has been found unlawful forecloses the use of this evidence to support affirmative race-conscious relief for Black persons who took other promotional examinations, or for females or other minorities, whether such persons were applicants or current employees. However, the district court approved a consent decree which not only provided affirmative, race-conscious relief to the 6 Black persons who had taken the 1978 promotional examination for the rank of lieutenant (*United States v. City and County of San Fran-*

cisco, 696 F. Supp. 1287, 1299 (N.D. Cal. 1988)) but also required the city and county to immediately promote 11 Black, 8 Hispanic, and 8 Asian or Filipino firefighters who had taken the abandoned 1984 promotional examination for the rank of lieutenant and permitted the city to promote 5 additional Black firefighters, 5 additional Hispanic firefighters, and 2 additional Asian or Filipino firefighters from among the participants in that examination. *Id.*, at 1299-1300.

The purpose and effect of these additional promotions of minorities who had participated in the 1984 examination for the rank of lieutenant was to place Black, Hispanic, and Asian or Filipino employees in that rank slightly in excess of the percentages of Black, Hispanic, and Asian or Filipino employees in the entire department.

In addition to these additional minority promotions, the consent decree established a "goal" that the city and county would promote minorities and women during the seven (7) year term of the decree in proportion to their representation in the participant pool for each promotional examination. *Id.*, at 1299-1300.

The consent decree also provided that the city and county was to hire at least 500 entry-level firefighters during the term of the decree, and established the "goals" that 40% of these new employees were to be minorities and 10% were to be women. *Id.*

Any failure by the city and county to meet its hiring and promotional goals could only be justified by proof that the city's selection procedures were valid under the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.1 *et seq.* *United States v. City and County of San Francisco*, *supra*, 696 F. Supp. 1287, 1313.

Because the district court's order of February 26, 1987, had not only remedied all past unlawful discrimination by the city and county other than the discriminatory im-

pact of the 1978 promotional examination for the rank of lieutenant upon Black candidates but had also permanently enjoined the city and county from committing any future unlawful discrimination, it necessarily follows that the foregoing affirmative race-conscious hiring and promotional requirements were not necessary to remedy unlawful past discrimination that remained uncorrected but instead were designed solely to establish and maintain a representation of females and minorities in all ranks of the San Francisco Fire Department in proportion to the number of females and minorities among residents of the city and county.

This fact is confirmed by the decree itself, which expressly states that its goal is to raise the minority representation of the sworn personnel of the Fire Department to forty percent (40%) and the female representation to ten percent (10%) in order that the minority and female composition of the San Francisco Fire Department "more nearly reflects the racial, ethnic, and sexual composition of the relevant labor force of the City and County of San Francisco." *Id.*, at 1313.

The decision rendered by this Court on December 4, 1989, erroneously concludes, however, that the decree is consistent nevertheless with the specific instructions given by the Supreme Court in *Local 28 of Sheet Metal Workers v. E.E.O.C.*, *supra*, 478 U.S. 421 and *United States v. Paradise*, *supra*, 480 U.S. 149, that affirmative race-conscious relief may only be imposed by the courts when there is no other effective way to ensure the full enjoyment of rights protected by Title VII of the Civil Rights Act of 1964, when other, race-neutral remedies have proven ineffective, when such relief is narrowly tailored to the specific employment practices that have been found unlawful, and when it is clear that the purpose of such relief is not solely to correct a racially imbalanced work force:

> The present case presents a fact situation similar to *Paradise*, but involves a voluntary consent decree. The district court has ordered the hiring of minorities and women in percentages equal to their representation in the labor market—the City and County of San Francisco—and the promotion of minorities and women in percentages equal to their representation in the relevant labor market—the fire department. The decree does not, however, contain any provision to stop the use of its promotion mechanism when its valid promotion objectives have been met. To ensure that the result of the hiring and promotional procedures does not become unreasonable, we modify the seven-year duration of the decree to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree.

Slip opinion, p. 14039.

Moreover, it is simply not true that the facts presented here are similar to those in *Paradise*.

In *Paradise*, affirmative race-conscious remedies were imposed "upon a defendant with a consistent history of resistance to the District Court's orders, and only *after* the Department failed to live up to its court-approved commitments." *United States v. Paradise*, *supra*, 480 U.S. at 170-171.

Here, on the other hand, the affirmative race-conscious remedies of the consent decree were imposed upon the City and County of San Francisco before it had any opportunity to develop and administer the entry-level and promotional examinations which it was required to develop and administer under the district court's order of February 26, 1987.

There was thus no evidence upon which the district court could conclude that the city and county had either resisted or purposely failed to live up to its court-approved commitments.

In addition, in *Paradise* the promotional quotas imposed for the upper ranks of the work force were only to remain in effect while there were qualified black candidates, the rank at issue was less than 25% black, and the employer had not developed and implemented a promotion plan without adverse impact for that rank. *Id.*, 480 U.S. at 163.

Here, on the other hand, promotions to the upper ranks in the work force are subject to limitations and restrictions which remain in effect regardless of whether the city and county administers nondiscriminatory promotional examinations.

For example, paragraph 13(e) of the consent decree prohibits the city and county from administering a promotional examination for the rank of battalion chief until such time as there are at least 10 Blacks holding the permanent rank of captain or above. (CR 695:14). Paragraph 13(d) prohibits the city and county from administering a promotional examination for the rank of lieutenant until 10 months after the graduation from the Fire College of at least 90 firefighters hired pursuant to the decree. (CR 695:13).

All of these facts, which were overlooked in the decision which the Court rendered in this appeal on December 4, 1989, make clear that the district court's order of February 26, 1987, constituted an adequate remedy for any unlawful discrimination committed by the City after the expiration of the *WACO* consent decree. The only purpose actually to be accomplished by the consent decree that was approved by the district court in this action on June 10, 1988, was to eliminate an underrepresentation of minorities and women in the workforce of the San Francisco Fire Department. A rehearing should therefore be granted and the decision of the district court on this point should be reversed.

IV. SUGGESTION FOR REHEARING EN BANC

As shown above, the decision which the Court has rendered in this appeal is in clear conflict with another decision of the Court, involves questions that have been the subject of several recent decisions of the Supreme Court, and directly conflicts with existing decisions of other courts of appeals on matters in which there is an overriding need for national uniformity. Defendant-Intervenor-Appellant Local 798 therefore suggests this petition for rehearing is appropriate for consideration en banc.

Dated: December 18, 1989

DAVIS, RENO & COURTNEY

By /s/ _____

DUANE W. RENO
Attorney for Local 798

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen, not a party to the within action and that my business address is 90 New Montgomery Street, Suite 909, San Francisco, CA 94105.

On December 18, 1989 I served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC on the following party(s) by placing a true copy thereof in the U.S. mail at San Francisco, California, fully posted and addressed as follows:

See Attachment A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 18th day of December 1989.

/s/ Grania B. Duffy
GRANIA B. DUFFY

ATTACHMENT A

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